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October 20, 1999

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 12th Street, S.W.
Washington, D.C. 20554

Re: KMC Telecom, Inc.'s Comments on Bell Atlantic's Section 271 Application for New York, CC Docket No. 99-295

Dear Ms. Salas:

KMC Telecom, Inc. ("KMC") filed its Comments regarding Bell Atlantic's Section 271 Application for New York[1] on October 19, 1999, using the Federal Communications Commission's ("Commission") Electronic Comment Filing System ("ECFS"). KMC received a receipt indicating that its comments were accepted by the ECFS and a confirmation number (19991019604019). KMC's Comments were filed without a signed original copy of the Exhibit. Enclosed please find the appropriate number of copies of KMC's Comments, including the Exhibit, and separately, copies of the Exhibit alone.

Should you have any questions, please do not hesitate to contact me at (202) 424-7877. Thank you for your assistance.

Sincerely,

Edward W. Kirsch

Edward W. Kirsch
Counsel for KMC Telecom, Inc.

cc: Janice Myles
ITS, Inc.

302931.1

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[1] *In the Matter of Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Bell Atlantic Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in New York Pursuant to Section 271 of the Telecommunications Act of 1996*, CC Docket No. 99-295 (September 29, 1999).

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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application by New York Telephone Company	)	CC Docket No. 99-295
(d/b/a Bell Atlantic - New York),	)	
Bell Atlantic Communications, Inc.,	)	
NYNEX Long Distance Company	)	
and Bell Atlantic Global Networks, Inc.,	)	
For Authorization to Provide In-Region,	)	
InterLATA Services in New York Pursuant	)	
to Section 271 of the Telecommunications	)	
Act of 1996	)	

COMMENTS OF KMC TELECOM, INC.

Russell M. Blau
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Counsel for KMC Telecom, Inc.

Dated: October 19, 1999

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SUMMARY

KMC Telecom, Inc. ("KMC") is one of the few competitive local exchange carriers ("CLECs") focusing on smaller cities. KMC contributes to meeting the pro-competitive goals of the 1996 Act by seeking to provide customers a full range of services including local, long distance, data, and advanced services such as HDSL.

As such, KMC has a substantial interest in ensuring the Commission successfully implements the market opening measures of section 271 prior to permitting Bell Operating company ("BOC") entry into the in-region interLATA services market. This proceeding will set the standard for all other section 271 applications and set important precedents regarding the Commission's section 271 analytical process. The Commission has an opportunity to assure that each item in the Competitive Checklist has been fully implemented and that there will be no "backsliding" by the Bell Atlantic to erase the modest progress realized in achieving the competitive purposes of the 1996 Act in New York. Bell Atlantic's New York Application should not be approved because its hot cut performance has been abysmal, and it has failed to demonstrate through independent third party testing and actual experience that it provides non-discriminatory and timely access to its Operations Support Systems with respect to xDSL loops, conditioning services and accurate loop prequalification information.

Most importantly, Bell Atlantic's New York Application should be denied because sufficient performance measures and self-executing remedies have not been established to preclude backsliding by Bell Atlantic, especially regarding provisioning of xDSL loops and related services. Finally, Bell Atlantic's New York Application should be denied because the New York local exchange market is not "fully and irreversibly open" to competition as required by the Commission's public interest standard. In particular, the market remains largely closed to competition in the smaller cities typically targeted by KMC.

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Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Bell Atlantic Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in New York Pursuant to Section 271 of the Telecommunications Act of 1996	)))))))))	CC Docket No. 99-295

COMMENTS OF KMC TELECOM, INC.

I. Introduction

KMC Telecom, Inc., and its affiliates ("KMC"), by its undersigned counsel and pursuant to the Commission's September 29, 1999, Initial Public Notice[1], respectfully submit these Comments in the above-captioned proceeding. KMC is a facilities-based provider of local and long distance telephone services, Centrex-type services, Internet access services, and equipment leasing and maintenance services, primarily oriented toward the business market in smaller cities.[2] In September, 1999, KMC introduced high bit-rate Digital Subscriber Line ("HDSL")

[1] *Comments Requested on Application by Bell Atlantic for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Public Notice, DA-99-2014 (rel. September 29, 1999 ("Initial Public Notice").

[2] KMC has built 23 networks in smaller sized cities and has 14 more networks under construction. KMC has constructed networks in the following cities: Huntsville, AL; Brevard, Daytona Beach, Fort Myers, Pensacola, Sarasota, and Tallahassee, FL; Augusta and Savannah, GA; Fort Wayne, IN; Topeka, KS; Baton Rouge and Shreveport, LA; Ann Arbor, MI; Eden Prairie, MN; Fayetteville, Greensboro and Winston-Salem, NC; Corpus Christi and Longview, TX; Hampton Roads and Roanoke, VA; and Madison, WI.

service in the Fort Meyers, Florida, and Winston-Salem, North Carolina markets. KMC plans a nationwide rollout of advanced HDSL based services in all of its current and future markets. KMC's substantial investments in HDSL and other advanced technologies, and its emphasis on smaller cities often ignored by the largest carriers, facilitates one of Congress' principal goals in passing the Telecommunications Act of 1996,[3] *i.e.,* "to accelerate the rapid private sector deployment of advanced telecommunications services to all Americans by opening all telecommunications services to competition."[4]

As a facilities-based provider of local exchange services, including advanced telecommunications services, KMC has a substantial interest in ensuring that the Federal Communications Commission ("Commission") successfully implements the Bell Operating Company[5] ("BOC") market opening obligations established in section 271 of the 1996 Act prior to permitting BOC entry into the in-region interLATA services market. The Commission's decision regarding Bell Atlantic's New York Application[6] will set the bar for all other BOC section 271 applications. KMC urges the Commission to set the bar high enough to ensure that the local exchange market is "fully and irreversibly open" to competition. In particular, KMC

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (1996) (*codified at* 47 U.S.C. § 251 *et seq.*) ("1996 Act'). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act."

[4] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996); *In the Matters of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48 (rel. March 31, 1999) ("Collocation Order") at 1.

[5] The New York Telephone Company, doing business as Bell Atlantic - New York ("Bell Atlantic"), is a Bell Operating Company under the 1996 Act. 47 U.S.C. § 153(4).

[6] *Application by New York Telephone Company (d/b/a Bell Atlantic-New York) et al. for Authorization To Provide In-Region InterLATA Services In New York*, CC Docket No. 99-295 (September 29, 1999) (hereinafter "New York Application").

urges the Commission to implement BOC market opening obligations in a manner that will assure the ability of CLECs focusing on smaller markets to effectively compete. Bell Atlantic should not be granted in-region interLATA service authority in New York, at this time, because the New York local exchange market is not "fully and irreversibly open" to competition in the smaller cities typically targeted by KMC, Bell Atlantic's entrance is not in the public interest, and Bell Atlantic has failed to implement several requisite requirements of the Competitive Checklist set forth in section 271(c)(2)(B) of the 1996 Act.

II. Bell Atlantic Has Failed To Satisfy Several Requirements Of The Section 271(c)(2)(B) Competitive Checklist In New York

Bell Atlantic has failed to demonstrate that it meets several requirements of the Competitive Checklist[7] in New York. Specifically, Bell Atlantic has failed to demonstrate that it provides nondiscriminatory access to unbundled loops, especially loops conditioned to provide advanced services, and nondiscriminatory access to its Operations Support Systems.

A. Bell Atlantic's "Hot Cut" Performance Is Unsatisfactory (Checklist Item (iv))

Section 271(c)(2)(B)(iv) of the 1996 Act requires a BOC seeking in-region long distance authority to provide nondiscriminatory access to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[8] In order to satisfy the nondiscrimination requirement under Checklist Item (iv), a BOC must demonstrate that it can efficiently provision commercial quantities of unbundled loops to competing carriers

[7] The "Competitive Checklist" consists of fourteen critical market-opening measures set forth in Section 271(c)(2)(B) of the 1996 Act. BOCs must affirmatively demonstrate compliance with these exacting market-opening measures as a prerequisite to BOC entry into the in-region interLATA telecommunications market.

[8] 47 U.S.C. § 271(c)(2)(B)(iv) ("Checklist Item (iv)").

within a reasonable time frame, with a minimum level of service disruption, and at the same level of service quality as it provides to itself or affiliates.[9]

Pursuant to this checklist item, Bell Atlantic is required to demonstrate on-time performance of "hot cut" procedures in which it disconnects a loop from a Bell Atlantic switch and reconnects the loop to a CLEC switch, while simultaneously modifying the number portability database to direct calls to the CLEC's switch. Bell Atlantic has agreed to coordinate closely with CLECs during a "hot cut" to ensure that during the procedure, a customer's service is interrupted for no more than five minutes.

Timely performance of hot cuts with minimal service interruptions to customers is critical to a new entrants' ability to satisfy and maintain customers.[10] Unfortunately, Bell Atlantic's hot cut performance has been unsatisfactory as convincingly demonstrated by AT&T and other CLECs operating in New York, and KPMG's independent testing. AT&T demonstrates, for example, that Bell Atlantic's on time hot cut performance for August 1999 was only 81%.[11] AT&T has also shown that for each week during a four week period beginning June 21, 1999, Bell Atlantic provided an inaccurate or incomplete Local Service Request Confirmation 50 to 60% of the time, and caused a severe CLEC customer service disruption, including loss of

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[9] *See* 47 C.F.R. § 51.313(b); 47 C.F.R. § 51.311(b); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶¶ 312-16 (1996) ("Local Competition First Report and Order").

[10] KMC underscored the importance of BOC hot cut performance to its business strategy in a letter submitted on February 1, 1999, to Commission Chairman Kennard. *See*, KMC letter to Commission Chairman William E. Kennard (Feb. 1, 1999) at 1-2 ("KMC Letter"). The KMC Letter is attached in the Appendix to these Comments.

[11] New York Application, Appendix C, Vol. 61, Tab 926, *AT&T Supplemental Affidavit of Jack Meek,* N.Y. PSC Case No. 97-C-0271, at 2-4 (Aug. 16, 1999); *See*, *Brief of AT&T Communications of New York, Inc.*, N.Y. PSC Case No. 97-C-0271 (Aug. 17, 1999) at 8-13 ("AT&T Brief").

dialtone,13.5% of the times it attempted a hot cut.[12] This mediocre level of performance by Bell Atlantic could rapidly destroy a CLEC's reputation regarding quality of service, and is of acute concern to KMC as it contemplates entering the New York market and other markets served by Bell Atlantic. While KMC does not yet operate in New York, KMC provides service in Virginia and has witnessed first hand Bell Atlantic's abysmal "hot cut" performance in Virginia. Bell Atlantic's hot cut performance is defective because it routinely fails to follow processes or fails to provide CLECs with accurate information.[13]

AT&T's allegations were largely substantiated by independent tests conducted by KPMG. KPMG reported, for instance, that Bell Atlantic failed to "consistently follow the established 'Hot Cut' coordination procedures as outlined in the Regional CLEC Coordination Center's (RCCC) 'RCCC Two Wire Analog Loop-RCCC North' document.[14]" In light of Bell Atlantic's dismal performance record regarding hot cuts, KMC is concerned that Bell Atlantic will continue to deliver defective hot cut performance, and will demonstrate similar poor performance in implementing access to new unbundled network elements including sub loop elements and inside wiring. The Commission should not grant Bell Atlantic's New York Application until it has remedied the deficiencies in its hot cut performance; agreed to stringent performance measures and self-executing remedies with teeth regarding access to xDSL capable loops, loop conditioning services, sub loop elements and inside wiring; and until Bell Atlantic has demonstrated compliance with these performance measures with actual performance data.[15]

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12 AT&T Brief, at 8-11.

13 *Id.*

14 KPMG, *Bell Atlantic OSS Evaluation Project, Final Report*, Aug. 6, 1999, at P12-3, Table IV-12.6: POP12 at POP12 IV-290 ("KPMG Final Report").

15 Access to sub loop elements and inside wiring is mandated by the Commission's recent order regarding unbundled network elements. *See*, *FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements*, Press Release, FCC 99-238 (rel. September 15, 1999).

B. Bell Atlantic Has Not Demonstrated It Provides Nondiscriminatory Access Through Its OSS To Loops Conditioned To Provide Advanced Services

Section 271(c)(2)(B)(ii) of the 1996 Act requires a BOC seeking to enter the in-region interLATA market to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 251(d)(1)."[16] In order to satisfy the Checklist Item (ii) nondiscrimination requirement, BOCs must provide nondiscriminatory access to their Operations Support Systems ("OSS") that is equivalent to the access the BOC provides itself, its customers or other carriers.[17] OSS provide critical functions, including but not limited to, pre-ordering, ordering, provisioning, maintenance and repair, and billing that are essential to competing carriers. Absent nondiscriminatory access to OSS functions, competing carriers would be unable to adequately receive, process, and install customer orders and provide quality service. Adequate access to BOC OSS functionality is crucial to KMC's market entry strategy in New York and all other states.

In its New York Application, Bell Atlantic is required to demonstrate by a preponderance of the evidence that it has deployed the necessary systems, databases, and personnel to provide competing carriers with access to each of the necessary OSS functions, so that a competing carrier can perform "a specific function in substantially the same time and manner as the incumbent performs that function for itself."[18] Bell Atlantic is required to show that it is "adequately assisting competing carriers to understand how to implement and use all of the OSS

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16 47 U.S.C. § 271(c)(2)(B)(ii) ("Checklist Item (ii)").

17 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20,543 (rel. August 19, 1997) at ¶ 130 ("Ameritech Michigan Order"); *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provided In-Region Inter-LATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd. 539 (rel. December 24, 1997) at ¶¶ 82-85 ("BellSouth South Carolina Order").

18 Ameritech Michigan Order, at ¶ 135-36; BellSouth South Carolina Order, at ¶ 96.

functions available to them."[19] Bell Atlantic must also demonstrate that the necessary OSS functions, and electronic and manual interfaces are "operationally ready" to provide service in commercial quantities, sufficient to meet forecasted demand.[20] As the Commission pointed out in its Ameritech Michigan Order, the "most probative evidence that OSS functions are operationally ready is actual commercial usage."[21] In the absence of substantial actual commercial usage over an extended period of time and independent third-party testing, Bell Atlantic simply cannot make the required showing to demonstrate by a preponderance of the evidence that it is providing nondiscriminatory access to its OSS with respect to xDSL capable loops, conditioning services, and other services necessary for CLECs to deploy broadband communications technologies.

In light of the importance of access to OSS functionality to effective competition, KMC is dismayed that there has been no testing and independent verification of Bell Atlantic's OSS regarding xDSL capable loops, conditioning services, loop prequalification information, and other ancillary services required to provide advanced services.[22] KMC is in the process of launching its HDSL product throughout the country and is concerned that there has been no independent validation of Bell Atlantic's xDSL provisioning process; Bell Atlantic's ability to deliver timely and accurate loop prequalification information; and Bell Atlantic's ability to condition loops for advanced services in a timely and nondiscriminatory manner. If this deficiency is not corrected with respect to Bell Atlantic's New York Application, an adverse

[19] Ameritech Michigan Order, at ¶ 136.

[20] Ameritech Michigan Order, at ¶ 136-37; BellSouth South Carolina Order, at ¶ 96.

[21] Ameritech Michigan Order, at ¶ 138; BellSouth South Carolina Order, at ¶ 97.

[22] KPMG testified that it did not test xDSL loop qualification, installation status, or service order status. *In the Matter of Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996*, N.Y. PSC. Case No. 97-C-0271, Minutes of Technical Conference Held June 10, 1996, Transcript at 2672-2673.

precedent will be set that will likely be followed in other states. Without assurance of nondiscriminatory access to loop prequalification information, xDSL provisioning, and loop conditioning services, BOCs will be able to impede CLEC market penetration into advances services, which is one of the fastest growing telecommunications market segments. Bell Atlantic's New York Application should be denied on the basis of this deficiency alone.

In addition to the lack of actual experience with, and independent third-party testing of Bell Atlantic's OSS regarding xDSL capable loops, however, there is a concomitant absence of performance measures and anti-backsliding provisions regarding xDSL. This deficiency is due entirely to Bell Atlantic's premature submission of its New York Application. Specifically, Bell Atlantic submitted its New York Application prior to the completion of the ongoing DSL collaborative process, designed to fill the holes in the existing performance measures and anti-backsliding provisions. Once the Commission approves Bell Atlantic's New York Application, Bell Atlantic will have meager incentive to continue to cooperate with the DSL cooperative. The Commission should deny Bell Atlantic's New York Application because adequate performance measures and self-executing remedies have not been implemented.[23]

III. Bell Atlantic Has Not Shown That The Requested Authorization Is Consistent With The Public Interest, Convenience, And Necessity

Section 271(d)(3)(C) of the 1996 Act requires that Bell Atlantic affirmatively demonstrate that approval of its New York Application is consistent with the public interest, convenience, and necessity.[24] The Commission examined the "public interest standard" in the context of a section 271 application in its Ameritech Michigan Order and concluded that the Commission has "broad discretion to identify and weigh all relevant factors in determining

[23] KMC first raised these concerns regarding inadequate performance standards for advanced services and remedies in its letter to Commission Chairman Kennard on February 1, 1999. *See*, Appendix, KMC Letter, at 3-5.

[24] 47 U.S.C. § 271(d)(3)(C).

whether BOC entry into a particular in-region, interLATA market is consistent with the public interest."[25] The Commission further concluded that its analysis under the public interest standard "should focus on the status of market-opening measures in the relevant local exchange market," and should consider "whether conditions are such that the local market will remain open as part of our public interest analysis."[26] The Department of Justice ("DOJ") has argued that the public interest standard, *inter alia*, entails an analysis as to whether the local market is "fully and irreversibly open to competition."[27]

In order to elucidate the public interest standard, the Commission set forth a non-exhaustive list of factors that it will consider to determine whether granting a particular section 271 application is consistent with the public interest. Accordingly, the Commission determined to consider: (1) whether all pro-competitive entry strategies are available to new entrants, including interconnection, UNEs and resale, and are available to different classes of customers (residential and business), in different geographic regions, at different scales of operation;[28] and (2) whether the BOC has agreed to performance monitoring, including performance standards

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[25] Ameritech Michigan Order, at ¶ 383.

[26] Ameritech Michigan Order, at ¶¶ 385, 390. Bell Atlantic has called for a different focus in its New York Application. *See, e.g.*, New York Application, at 62-63 n.46. Bell Atlantic has argued that the public interest standard should focus not upon the status of local market-opening measures; rather, Bell Atlantic erroneously urges the Commission to focus exclusively on the competitive impact of Bell Atlantic entry into the New York long distance market. The Commission rejected this position in its Ameritech Michigan Order and should emphatically reject it in the present proceeding as well. *See*, Ameritech Michigan Order, at ¶¶ 382-386.

[27] DOJ first adopted the "fully and irreversibly" open to competition standard as part of its analysis of SBC Communications, Inc.'s section 271 application for Oklahoma. *See In re Application of SBC Communications, Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121, Evaluation of the United States Department of Justice, 36-55 (May 16, 1997); Ameritech Michigan Order, at n.982.

[28] Ameritech Michigan Order, at ¶ 391.

and reporting requirements, which provides a measure of present BOC compliance and permits benchmarking; and (3) whether the BOC has agreed to self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards.[29] Bell Atlantic has failed to demonstrate compliance with several of these factors in its New York Application as set forth below.

A. The Level Of Competition Outside The Major Metropolitan Areas Is Minuscule

Bell Atlantic's New York Application does not satisfy the public interest standard because there is little facilities-based competition outside the largest cities in New York (competition is not geographically diverse as required),[30] and therefore the local exchange market is not fully and irreversibly open in the smaller cities. Bell Atlantic repeatedly argues that "[f]acilities-based entry in New York is massive," and the fact that competitors have made significant investments (sunk costs) in the market indicates that the market is irreversibly open.[31] Bell Atlantic's own data, however, indicates there is only meager facilities-based competition outside the largest cities. Competition in the local exchange market in New York is confined primarily to a few large cities: New York City and its metro area, Albany, Buffalo, Binghamton, and Syracuse. New Yorkers residing in suburban and rural areas, and smaller municipalities have been left out of the halting movement toward competition due to Bell Atlantic's continued maintenance of barriers to competition. For example, Bell Atlantic's own data shows that there are a large number of wire centers in New York that do not have a single collocating competitor.[32] Bell Atlantic touts that there are 651,793 facilities-based lines served by CLECs

[29] Ameritech Michigan Order, at ¶¶ 393-394.

[30] Ameritech Michigan Order, at ¶ 391.

[31] *See, e.g.*, New York Application, at 4, 73-74; Declaration of William E. Taylor, Attachment A ¶ 45 ("Because competitive entry in New York is so heavily facilities-based, it is irreversible.").

[32] New York Application, Decl. of Taylor, Attachment A, Exhibit 5.

throughout New York. Bell Atlantic fails to point out, however, that 564,071 of these lines, or about 87%, are located in New York City and the surrounding metropolitan areas.[33] The remaining facilities-based lines in other areas of the state are found primarily in the largest cities. Further, although Bell Atlantic maintains with some fanfare that CLECs have gained 250,000 residential customers[34] in the three and one half years since the passage of the 1996 Act, it fails to recognize that this represents a CLEC residential market penetration of merely 1 percent of the population of New York,[35] and most of these residential lines are provided by resellers. In light of its strategy of focusing on smaller cities, KMC is acutely concerned about the demonstrated lack of competition in New York outside all but the largest metropolitan areas, and hence, the high probability of continued Bell Atlantic obfuscation in smaller cities.

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33 According to Bell Atlantic's estimates there are 383,790 facilities-based lines served by CLECs in Manhattan, 66,318 in Queens and Brooklyn, and 113,963 in the Nassau and Suffolk areas. New York Application, Decl. of Taylor, Attachment A, Exhibit 6.

34 New York Application, at 75.

35 The population of New York is about 20 million. *See* U.S. Census Bureau State Population Estimates, (Dec. 31, 1998) available at http://www.census.gov/population/estimates/state/st-98-3.txt.

B. The Performance Measures And Remedies Offered By Bell Atlantic Are Insufficient To Preclude Backsliding In Advanced Services And Other Markets

The Commission favors self-executing enforcement mechanisms in order to prevent new entrants from being driven out of business by being forced by the BOC "to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent."[36] The Performance Assurance Plan ("PAP") proposed by Bell Atlantic does not satisfy this goal and is fundamentally flawed because it relies upon a system of billing credits to compensate competing carriers for failure to satisfy performance measures. Billing credits are not a sufficient remedy for new entrants such as KMC that are experiencing discriminatory conduct by Bell Atlantic in smaller cities. The billing credits will provide a paltry remedy after an extended delay, and after a CLEC's business plan has potentially been jeopardized. In addition to billing credits provided for in the PAP, Bell Atlantic should be compelled to offer substantial price reductions for all UNEs and a dramatically lower wholesale discount rate in the event performance measures are not satisfied.[37] Further, in instances where UNE price reductions and a decrease in the wholesale discount rate do not compel Bell Atlantic compliance within 60 days, Bell Atlantic should be required to pay material fines for each instance in which a performance measure is not satisfied.

The Performance Assurance Plan is also fundamentally flawed because it will enable Bell Atlantic to offset poor performance in one category against another category through the use of aggregate statistics. Further, Bell Atlantic would be able to use adequate performance in one month to offset poor performance in another month. Such inconsistencies in Bell Atlantic's performance could rapidly undermine a new entrant's reputation for quality and frustrate its market entry strategy.

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[36] Ameritech Michigan Order, at ¶ 394.

[37] KMC first proposed similar self-executing remedies in its letter to Commission Chairman Kennard on February 1, 1999. *See*, Appendix, KMC Letter, at 3-5.

Even in those instances where Bell Atlantic's discriminatory conduct might lead to financial penalties, those penalties are not of sufficient magnitude to compel Bell Atlantic to provide non-discriminatory service on a consistent basis. Bell Atlantic will realize revenues of several billion dollars by providing both local and long distance services in New York once it is granted authority to provide in-region interLATA service. The $269 million maximum remedy proposed in Bell Atlantic's performance assurance plans is clearly insignificant when compared to the enormous anticipated revenue streams.

C. The Commission Should Preclude BOCs From Assessing Termination Penalties Pursuant To Term Contracts And Tariffs Executed Prior To The Grant Of 271 Authority

Bell Atlantic continues to impose termination liability on customers who entered into term contracts or tariff term plans with Bell Atlantic and subsequently elect to switch to CLEC services. This practice is anti-competitive and further demonstrates that the New York market is not "fully and irreversibly" open to competition. KMC has consistently argued in filings with the Commission and the states that the Commission should preclude BOCs from imposing such termination liability, and should provide a "fresh look" opportunity to consumers upon the grant of a BOC section 271 application.

IV. Conclusion

For the foregoing reasons, the Commission should adopt the recommendations in these comments.

Respectfully submitted,

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(202) 424-7500
Counsel for KMC Telecom, Inc.

Dated: October 19, 1999

CERTIFICATE OF SERVICE

I, Edward W. Kirsch, hereby certify that I have on this 19th day of October 1999, served copies of the foregoing Comments of KMC Telecom, Inc. on the following via hand delivery or Federal Express, as indicated:

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Edward W. Kirsch

Exhibit
(To be filed with Commission on October 20, 1999)

302512.1

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Michael A. Sternberg
President and
Chief Executive Officer

February 1, 1999

Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: KMC TELECOM INC.'S PROPOSAL FOR INCENTIVES FOR PERFORMANCE OF SECTION 251 AGREEMENTS

Dear Chairman Kennard:

I am writing to you on behalf of KMC Telecom Inc. ("KMC"), a competitive local exchange carrier ("CLEC"), to propose that the Commission explore and adopt additional incentives that will encourage the incumbent local exchange carriers ("ILECs") to comply with their obligations under the Telecommunications Act of 1996.

KMC and its affiliates are currently providing facilities-based local exchange service in competition with the ILECs in eleven states. KMC has 23 fiber networks in place that serve approximately 50 cities. KMC has entered each new market as a reseller of the ILEC's service. Upon completing construction of its own networks, KMC has made its facilities-based local service available to its customers. To extend the reach of its networks, KMC purchases unbundled elements ("UNEs"), principally loops, from the ILECs. Unfortunately, it has been KMC's experience that the ILECs repeatedly miss due dates scheduled for installation of UNEs and fail to properly coordinate conversions of unbundled loops and interim number portability ("INP"). When due dates are missed and conversions are mishandled, KMC's business reputation and its ability to compete suffers.

While a great deal of effort has been expended on both the federal and state levels evaluating various methods for measuring the ILECs' performance of their obligations under the Telecommunications Act, little has been done (outside of the Section 271 context) to create incentives for the ILECs to comply with those obligations. KMC submits that the proposal outlined below will create such incentives and hopefully will convince the ILECs that it is in their business interests to treat CLECs in a nondiscriminatory manner.

Introduction

Section 251 of the Telecommunications Act of 1996 created a duty for ILECs to provide other telecommunications carriers with a variety of services and facilities for their use in offering competitive local exchange services. These duties include, among other things: (1) interconnection to the ILEC's network at any technically feasible point; (2) access to unbundled network elements, including local loops, signaling, databases, operator services, switching and transport functionalities; and (3) the ability to resell basic local exchange services and all optional services and features at a wholesale discount.

Although the Telecommunications Act created these legal duties, it left the details of enforcing them to negotiation between carriers and/or arbitration by state public utility commissions. The first three years of experience under the Act have shown that effective enforcement provisions are critical. The Act creates an inherently unstable situation – ILECs are required by law to provide services and facilities to "customers" who will use these offerings to compete against them. They have no incentive, other than the threat of regulatory discipline, to provide a high quality of service to their competitors. As a result, CLECs have suffered from slipshod ordering practices, delayed installations, missed appointments, lack of coordination in customer cut-overs resulting in service disconnections, and a host of other service disruptions. Both the Commission and various state commissions have recognized repeatedly that the ability of CLECs to compete with and win customers from an ILEC is seriously impaired when the ILEC engages in such service-affecting practices.

To succeed in the competitive marketplace, facilities-based CLECs need access to the ILEC's UNEs to fill in gaps in their network coverage. Resale is an effective market entry vehicle that can be used to develop a customer base until a CLEC has constructed its own network. Because of the relatively small wholesale discounts, however, resale yields very slim margins and is not likely to prove profitable in the long run. The recent financial troubles experienced by USN, one of the first resellers in the market, demonstrate that turning a profit on resale is an uphill (and perhaps unwinnable) battle. For this reason, it has become more and more difficult for CLECs that are not facilities-based to raise capital. Even for facilities-based CLECs, Wall Street wants assurances that CLECs can win customers from the ILECs and serve them over their own networks. Access to capital dries up when CLECs are unable to demonstrate that they can migrate customers to their own networks. Investors focus on the bottom line and are unmoved by complaints that the ILECs are to blame for hampering the CLECs' ability to convert customers more quickly and transparently. If capital is not available to CLECs, the goals of the Telecommunications Act will not be realized.

The legal obligations imposed on ILECs by the Telecommunications Act have not proven sufficient to incent ILECs to provide an acceptable level of service to CLECs. KMC submits that the time is ripe for trying a new approach that will convince ILECs that providing good service to CLECs makes good business and economic sense.

A New Approach To Incenting Better Performance

The performance standards (to the extent there are any) contained in the first generation of interconnection agreements (many of which are due to expire this year) do not adequately address the actual problems associated with ordering and provisioning UNEs and INP that CLECs have encountered in their day to day dealings with ILECs and are generally so lax that ILECs would have to expend a lot of effort not to be in compliance. As a result, the remedies provided for specified performance breaches, which are usually in the form of liquidated damages, are not readily available so as to incent the ILECs to improve their performance or treat CLECs like the large wholesale customers that they are, rather than as competitors.

In an effort to induce ILECs to improve their UNE and INP ordering and provisioning processes, more precise performance standards and stronger remedies must be incorporated into interconnection agreements and/or state and federal regulations to incent the ILECs to comply with their obligations under the Telecommunications Act. KMC submits that, in order to achieve the desired effect, the remedies must be self executing and must be triggered immediately when an ILEC fails to meet a minimum level of performance. In addition, the remedies must be tailored to compensate the CLEC for the lost revenues and loss of customer good will that result when the ILEC (1) fails to provide a CLEC with a timely firm order commitment (FOC) specifying a due date for installing an unbundled loop, other UNE or INP or, (2) fails to meet the due date specified in a FOC.

Performance standards and remedies are the subject of regulatory proceedings pending before the FCC and a number of state commissions. The proposals being debated include the nature of the standards, acceptable deviations from parity requirements, reporting requirements and (on the state level at least) penalties for failure to comply with performance benchmarks. All of the pending proposals contemplate legal or regulatory solutions to what is a very real business issue. In the competitive marketplace, businesses do not perform because of the threat of legal or regulatory penalties for failure to perform. Businesses perform to make money and improve the bottom line. KMC believes that regulators and industry members must recognize this fact of life in the context of implementing incentives to improve ILEC compliance with installation due dates. Adopting a business, rather than a legal, solution to a business problem is likely to do more to discourage anticompetitive behavior on the part of the ILECs than any threat of regulatory penalties.

Both the end user and the CLEC suffer when an ILEC fails to meet a scheduled due date. In contrast, the ILEC benefits from any delays in migrating a customer to a CLEC's service by continuing to collect revenues from the customer. One mechanism for alleviating the inconvenience to the customer, avoiding the potential for lost revenues to the CLEC, and for ensuring that the ILEC does not profit from delays in cutting a customer over to a CLEC's service is to require ILECs who fail to meet scheduled due dates or who fail to provide timely FOCs to immediately convert the affected customer to the CLEC's resale service until the cut over is completed. When customers are converted to a CLEC's resale service under these circumstances, the wholesale discount should be 65% off of the retail rate for the service. Although this "incentive" discount is significantly higher than the resale rate applicable in any jurisdiction, it approximates the margin a CLEC would realize when providing local exchange service using its own network facilities in combination with UNEs obtained from the ILEC. As such, it would serve to compensate the CLEC for the revenues lost as a result of the ILEC's delays in provisioning the UNEs.[1] In addition, the ILEC should be required to waive nonrecurring charges for any UNEs not provided by the scheduled due date.

KMC's proposal is consistent with remedies being implemented by various state commissions designed to incent ILECs to meet performance standards and benchmarks in connection with their efforts to meet the nondiscrimination and parity requirements of Section 271 of the Telecommunications Act. For example, in New York, Bell Atlantic has agreed to increase the wholesale discount and to reduce UNE prices for CLECs to which it provides below-standard service over a thirty day period. In Texas, Southwestern Bell has agreed to a two tier penalty structure for failure to meet due dates. Under the first tier, Southwestern Bell must pay CLECs liquidated damages to remedy the specific harm caused by its failure to perform. Under the second tier, Southwestern Bell must pay fines to the Texas State Treasury when its overall performance falls below a certain level and adversely affects competition.

Whether the financial penalties adopted in New York and Texas will succeed in incenting the ILECs to improve their performance in delivering UNEs to CLECs remains to be seen. KMC submits that its proposal represents a refinement of the approaches adopted in New York and Texas that will produce pro-competitive results more rapidly. KMC's proposal has several advantages over the New York and Texas remedies. First, it is self executing and provides immediate relief to the CLEC and the end user. Second, it will reduce litigation time and costs by eliminating the need for CLECs to bring claims for damages caused by the ILECs' failure to meet performance standards before state or federal regulatory agencies or courts. Finally, it helps to minimize the harm caused to CLECs and end users even if the ILECs do not improve their performance. By requiring the ILEC to convert the CLEC end user to resale service at a 65% discount immediately when a due date is missed, (1) the CLEC is able to earn the margin it would otherwise have realized had the UNEs been timely provided, (2) the end user is able to begin receiving service from the local exchange carrier of its choice on the due date promised, and (3) the ILEC is denied at least some of the financial benefits that accrue from continuing to provide service to the end user beyond the scheduled due date.

KMC submits that implementation of its proposal will go a long way toward qualifying the RBOCs for interLATA relief under Section 271 of the Act. One common thread running through every Commission decision denying the RBOCs Section 271 relief is the RBOCs' failure to make access to their operating support systems ("OSS") available to CLECs on a nondiscriminatory basis, a factor which the FCC has repeatedly found significantly impairs competition. Ordering and provisioning are OSS functions on which the RBOCs consistently have come up short. Because KMC's proposal would significantly reduce the anticompetitive impact of an RBOC's failure to meet a scheduled due date or provide a timely FOC, RBOC entry

[1] The wholesale discount should revert to the normal rate if and when the ILEC is prepared to install the service originally ordered by the CLEC or if the CLEC fails to accept that service or prevents the installation.

into the interLATA market could be hastened where the RBOC incorporates KMC's self executing proposal into its interconnection agreements and fully complies with the requirements.

A New Approach To Promoting Competition In The Residential Market

Almost three years after the passage of the Telecommunications Act, there is almost no facilities-based competition in the residential market. The biggest factor contributing to the lack of competition is the expense of constructing facilities, especially loops, to serve residential customers. While ILECs often accuse CLECs of engaging in cream-skimming by targeting their marketing efforts to the more lucrative business market, the uncertainty surrounding the ILECs' obligation to combine UNEs for CLECs and the ILECs' right to separate UNEs has hampered the development of competition in the residential market. Where the ILEC refused to do the combining or insisted on separating UNEs, a CLEC was required to collocate in every central office in which it wanted access to UNEs, thereby significantly increasing its capital expenses.

Because an RBOC must demonstrate that at least one competitor is providing facilities-based service to residential customers in order to qualify for Section 271 relief, the absence of facilities-based competition will continue to frustrate the RBOCs' efforts to enter the long distance market. The RBOCs could remedy this situation by agreeing to combine UNEs for CLECs that use the UNEs to serve residential customers. Although the Supreme Court's recent decision in the Iowa Utilities Board case would seem to mandate this result, the decision has raised new questions relating to the access to UNES that ILECs must make available. KMC submits that, until the latter issue has been resolved by the Commission, a voluntary commitment by the ILECs to continue providing access to the UNEs defined in the Commission's (now vacated) Rule 319 will make it more economically feasible for facilities-based CLECs to serve the residential market through a combination of their own facilities and UNEs purchased from the ILEC.

KMC urges the Commission to institute a proceeding to implement these business-oriented proposals to promote the development of facilities-based local competition.

Respectfully submitted,

Michael A. Sternberg
President and Chief Executive Officer

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Larry Strickling, Esq.

KMC, Bell Atlantic, New York

Exhibit
(To be filed with Commission on October 20, 1999)

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Michael A. Sternberg
President and
Chief Executive Officer

February 1, 1999

Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: KMC TELECOM INC.'S PROPOSAL FOR INCENTIVES <u>FOR PERFORMANCE OF SECTION 251 AGREEMENTS</u>

Dear Chairman Kennard:

I am writing to you on behalf of KMC Telecom Inc. ("KMC"), a competitive local exchange carrier ("CLEC"), to propose that the Commission explore and adopt additional incentives that will encourage the incumbent local exchange carriers ("ILECs") to comply with their obligations under the Telecommunications Act of 1996.

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While a great deal of effort has been expended on both the federal and state levels evaluating various methods for measuring the ILECs' performance of their obligations under the Telecommunications Act, little has been done (outside of the Section 271 context) to create incentives for the ILECs to comply with those obligations. KMC submits that the proposal outlined below will create such incentives and hopefully will convince the ILECs that it is in their business interests to treat CLECs in a nondiscriminatory manner.

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KMC Telecom
Creative Solutions with a Hometown Touch